No. 20273

IN THE

United States Court of Appeals For the Ninth Circuit

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, a corporation,
Appellant,

v.

PACIFIC INLAND NAVIGATION COMPANY, INC., a corporation, as successor to Inland Navigation Company,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

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HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

STATEMENT AS TO JURISDICTION

Appellee and appellant are residents of different states and the amount in controversy in the District Court and in this Court exceeds $10,000. Accordingly, the District Court had and acquired jurisdiction pursuant to Title 28 U. S. Code § 1332 (Tr. 27, 62, 63, 73).

From the Judgment (Tr. 76, 77) entered on May 24, 1965, appellant timely filed in this Court its Notice of Appeal (Tr. 78) and Supersedeas and Cost Bond (Tr. 79, 80) on June 23, 1965, in accordance with Rule 75, Rules of Civil Procedure.

STATEMENT OF THE CASE

Appellee, as successor of Inland Navigation Company, brought this action to recover $3,692.16 paid to the Port of Pasco for damage to its dock arising out of an explosion and fire occurring December 16, 1958, aboard appellee's gasoline-carrying Barge 535, Port of Longview, and previously litigated in this Court in Cause No. 18644 decided October 28, 1963 (Tr. 5). In addition, appellee sought to recover its litigation expenses ($14,372.09) incurred in defending against the Port of Pasco's claim (Tr. 6, 7). Appellee's right of recovery was predicated on a contract of insurance issued by appellant to appellee's predecessor, Inland Navigation Company, the pertinent portions of which (Tr. 23-29) were incorporated by reference in the Complaint (Tr. 2).

Appellant admitted the issuance of the policy, the damage to the dock and the amount thereof, and appellant's refusal to defend appellee and pay the Port of Pasco's claim (Tr. 24). As an affirmative defense appellant alleged that the dock involved was occupied and used by appellee pursuant to a long-term lease with the Port of Pasco and that at the time of explosion of Barge 535, appellee was exclusively using, occupying and controlling the dock involved and that the policy of insurance excludes coverage for injury to such property (Tr. 25; See Ex. "A," Exclusion (f), Tr. 10).

The facts are hardly in dispute. Most facts were agreed or admitted and incorporated in the Pre-Trial Order (Tr. 27 through 40) and subsequently set out *verbatim* as find-

ing of fact (Tr. 63 through 73) or incorporated by reference therein (Tr. 62). Briefly, these are as follows:

Appellee and its predecessor, Inland Navigation Company, have for many years operated certain petroleum storage facilities at Pasco, Washington under various leases from the Port of Pasco (Exhibit C, D, E, F; Tr. 83).

The Port of Pasco owns certain dock facilities diagramed on Exhibit "B" which appellee and others have the right to use.

A portion of the dock facilities is used for general cargo or grain. Another portion is used by appellee for the purpose of transferring petroleum from water carriers to land or vice versa (St. 42, 48; Tr. 38). The latter, called the "oil-dock," is diagramed on Exhibit "G," and is the only portion of the dock involved in the Port of Pasco's claim (Tr. 37); ¶ No. 20; St. 39). This so-called "oil dock" was used by plaintiff's predecessor during all of 1958 for the purpose of transferring petroleum products, and such dock was actually used as a part of the operation of the tank farm as an interchange facility (St. 41, 42).

In fact, the dock had been used by appellee for the purpose of transferring petroleum products from or to vessels approximately two hundred twenty-five (225) times during 1958 (St. 66), and Barge 535 had been moored at the precise location about 30 times in 1958 according to appellee's estimates (St. 66). Of course, Mr. Paul Light, General Manager of appellee's predecessor in December 1958 (at the time of trial, assistant to the president handling traffic matters), lacked knowledge that any other

people—other than appellee's predecessors—were using or had used the "oil dock" at the time of loss in December 1958 (St. 46), although John Walls—who had worked under Mr. Light (St. 70)—remembered one occasion when pleasure boats delayed appellee's access to the dock (St. 112).

On the afternoon of December 15, 1958, Barge 535 and Barge 536 had arrived at the Port of Pasco dock facilities under tow of the tug "Keith". Barge 536 had discharged or transferred its cargo through the hose pump and pipeline on the "oil dock" to the tank farm from about 3:30 to 8:00 p.m., at which time it was moved from its position beside the "oil dock" up-river, in order to moor Barge 535 alongside the "oil dock" for the purpose of discharging or transferring its cargo through the hose, pump and pipeline mentioned (Tr. 37). These were the only means provided at the time of explosion by which petroleum products could be transferred or discharged from appellee's vessels to tank farm, or vice versa (Tr. 38; St. 41, 42).

At the time of the explosion, Barge 535 was starboard side to the "oil dock" designated on Exhibit "G" with the forward section breasting the face of the dock and the stern fast to a dolphin, which was about forty (40) feet down-river from the "oil dock" as indicated on Exhibit "G" (Tr. 37). The barge "Onandaga" owned and/or operated by Tidewater-Shaver Barge Lines, Inc., was moored approximately 200 feet up-river (west) of Barge 535 alongside the general cargo or "grain" area of the dock (Tr. 30, 38). The Tug "Keith" and Barge 536 were

moored approximately 600 and 500 feet, respectively, upriver, alongside the dock (Tr. 30).

From the time of arrival of Barge 535, the "oil dock" was used by appellee for the purposes of access of persons to and from the barge. No person other than employees of appellee are known to have crossed over and upon the dock the evening of December 15, 1958, prior to the explosion of Barge 535 (Tr. 38; St. 42).

While so moored and in the course of discharging its gasoline cargo on the evening of December 15, 1958, Barge 535 exploded, caught fire, and sank (Tr. 31). The fire spread to the dock of the Port of Pasco, extensively damaging it (Tr. 31). Only that portion of the dock facility approximately 123 feet in length and 50 feet in width, designated on Exhibit "G" as "oil dock" was involved in the Port of Pasco's claim against appellee (Tr. 37). The general cargo or grain-dock facilities were not damaged, although the Tidewater-Shaver barge "Onandaga" was damaged and a claim for such presented to and paid by appellant (Tr. 33).

Appellant refused to honor the claim for damage to the "oil dock", and after appellee's liability had been established and discharged (Tr. 33), it brought this action on the insurance contract for reimbursement of the amount paid to the Port of Pasco and its litigation expenses reasonably incurred in defending against the Port's claim. The amounts claimed by appellees were admitted by appellant and were never involved as issues.

The only question involved was whether or not under the contract of insurance (Exhibit "A"), Coverage "C" (Tr. 9) would apply to the loss of the Port of Pasco's dock.

The issues of fact and law were framed in the Pre-trial Order (Tr. 45-48) and appellee's and appellant's contention therein set out in detail (Tr. 40-44). In short, appellee claimed specific coverage under Endorsement 23 (Tr. 23), contending that such endorsement clearly superseded Exclusion (f) of the printed policy form (Tr. 10). On the other hand, appellant claimed that Exclusion (f) and Endorsement 23 were not inconsistent and should be harmoniously applied to the facts and that the undisputed facts established that Exclusion (f) applied to prohibit coverage of the dock.

Following submission of written memorandum and in advance of trial, the District Court ruled (Tr. 53) that Endorsements 3 and 23 pertained solely to Exclusion (b) of the printed policy and it was not intended or contemplated that either would in any way affect Exclusion (f). Finding no ambiguity on the face of the policy, the Court ruled that parol evidence would not be admissible to vary the terms of the contract.

At the time of trial March 3, 1965, appellee submitted an offer of proof (Tr. 54-57) pertaining to negotiations concerning the insurance contract. The Court reserved ruling on the admissibility thereof until hearing a portion of the testimony (St. 55) at which time the Court adhered to its prior decision that Endorsements 3 and 23 pertained solely to Exclusion (b) and not to Exclusion (f) (Tr. 54).

Thereupon the Court determined that coverage existed under Endorsement 23 when read in the light of other policy provisions and in any event there existed an ambiguity which should be resolved in appellee's favor (St. 55). The Court then continued the matter for the reception of evidence indicated in plaintiff's offer of proof (St. 56, 57).

Upon recommencement of proceedings March 26, 1965, the Court allowed appellant a continuing objection to all evidence of a parol nature (St. 74). Thereafter, having received all such evidence, the Court on April 29, 1965, rendered its Memorandum Decision and Order (Tr. 58-60). On May 24, 1965, after partial rejection of appellant's proposed findings of fact (Tr. 84), the Court made and entered Findings of Fact, Conclusions of Law and the Judgment from which this appeal is taken.

SPECIFICATIONS OF ERROR

1. The District Court erred in making and entering Finding of Fact 7 insofar as it found that the dock involved herein was not "leased" by appellee's predecessor (Tr. 65, l. 2), for the reason that such finding is contrary to the undisputed evidence (Exhibits C, D, E, F).

2. The District Court erred in making and entering Finding of Fact 7, (Tr. 65, l. 19-20) that "the use of the Port of Pasco dock by plaintiff on December 15, 1958, was a non-exclusive use," because the undisputed and admitted facts in evidence are that the appellee and its employees were the *only* persons using the dock on the date indicated

—and known to have used the dock during the entire calendar year 1958.

3. The Court erred in making and entering Finding of Fact 18 (Tr. 69) which provides: "Because of the limited nature and extent of the use of the Port of Pasco dock by plaintiff's predecessor, the language of Exclusion (f) of defendant's policy (Exhibit "A"), when considered as part of the entire policy with its endorsements, and in the circumstances shown by the evidence in this case, was not understood or intended by the parties to exclude coverage for third-party claims as asserted against plaintiff's predecessor by the Port of Pasco for loss and damage to its dock in the fire and explosion aboard Barge 535 on December 15-16, 1958", for the reason that such finding is without evidentiary support or based upon testimony erroneously received in evidence over appellant's objection on parol evidence grounds.

4. The District Court erred in making and entering Conclusion of Law 4 (Tr. 74) as follows:

"Because of the limited nature and extent of right to and use of the Port of Pasco dock by the insured, Exclusion (f), when considered as part of the entire policy with its endorsements, was not understood or intended to exclude coverage for claim asserted against the insured by the Port of Pasco for loss and damage to the dock" for the reasons specified immediately above concerning Finding of Fact 18.

5. The District Court erred in making and entering Finding of Fact 22 and Conclusion of Law 6, insofar as the

Court found and concluded that appellee is entitled to judgment herein for the reason that such is contrary to the undisputed facts and law applicable thereto.

6. The Court erred in making and entering Conclusion of Law 7 as follows:

"If on appeal it be found that there was an ambiguity in the insurance policy (Exhibit "A"), the parol evidence presented by the parties, subject to the Court's ruling on its admissibility, does not show that the parties to the insurance contract intended to exclude coverage for the third-party claim in question asserted by the Port of Pasco," for the reason that such conclusion is either without evidentiary support or inferred from evidence received in violation of the parol evidence rule, the pertinent Washington statute RCW 48.18.190, the decisional law interpreting same, and the insurance contract (Tr. 14, ¶ 16).

7. The District Court erred in making and entering judgement in favor of the appellee for the reason that such judgement is not supported by the evidence and law applicable and is in conflict therewith.

8. The District Court erred in failing to find and conclude that appellee's actual admitted, exclusive use, occupancy, rental, and control of the dock destroyed—at the time of its loss—clearly establish the dock as property excluded from coverage under Exclusion (f) of the applicable insurance contract (Tr. 10) because:

a. At the time of loss the property involved was, as a matter of fact:

(1) rented by appellee, or
(2) occupied by appellee, or
(3) used by appellee, or
(4) under appellee's care, custody and control, or
(5) under appellee's physical control; and

b. Such use, occupancy, rental, and control of the destroyed dock at the time of loss establish such dock as property within Exclusion (f) of Exhibit "A" (Tr. 18) therefore precluding coverage to appellee as a matter of law.

SUMMARY OF ARGUMENT

Appellant's specifications of error present three principal propositions which shall be argued in the following order:

1. The insurance contract (Ex. "A") including Endorsements 3, 10 and 23 and all other pertinent (Tr. 9-23) is plain, clear, unambiguous, devoid of uncertainty and should be, according to its terms applied to the undisputed facts relating to appellee's rental, use, occupancy, care, custody and control of the property damaged (oil dock) thereby precluding coverage.

2. Parol evidence is inadmissible to add to, detract from, modify or contradict the insurance contract herein.

3. Assuming that parol evidence was properly admitted, such does not support a Judgment against appellant, and the evidence as a whole is insufficient as a matter of law to support the Judgment entered.

ARGUMENT

1. The insurance contract and its endorsements are not conflicting, are plain and unambiguous, and should be applied according to their plain terms. The pertinent policy provisions are as follows:

COVERAGE C

Property Damage Liability Other Than Automobile

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law or by written contract for damages, because of injury to or destruction of property, including the loss of use thereof, caused by accident.

EXCLUSION (b)

This policy does not apply: . . . under Coverages A and C, except with respect to operations performed by independent contractors and except with respect to liability assumed by the insured under a contract covered by this policy, to the ownership, maintenance, operation, use, loading or unloading of (1) watercraft if the accident occurs away from the premises owned by, rented to or controlled by the named insured, except insofar as this part of this exclusion is stated in the declarations to be inapplicable, or (2) aircraft;

ENDORSEMENT 3

Watercraft

It is agreed that such insurance as is afforded by the policy for bodily injury and property damage liability applies with respect to the watercraft described below, while away from the premises owned, rented or controlled by the named insured, provided, that the insurance does not apply to any watercraft while rented to others or while used for carrying passengers for a consideration.

Non-Self-Propelled vessels owned by the named insured.

ENDORSEMENT 23

Canceling Previous Endorsement

It is agreed that Endorsement Number 3 is hereby cancelled.

"It is agreed that coverages "A" and "C" of this policy shall specifically apply to the ownership, maintenance, operations, use, loading or unloading of watercraft; provided, however, that such coverage shall apply only to non-self-propelled vessels and self-propelled vessels under 25 feet in length."

EXCLUSION (f)

This policy does not apply: . . .

(f) under Coverage C, to injury to or destruction of (1) property owned or occupied by or rented to the insured, or (2) except with respect to liability under sidetrack agreements covered by this policy, property used by the insured, or (3) except with respect to liability under such sidetrack agreements or the use of elevators or escalators at premises owned by, rented to, or controlled by the named insured, property in the care, custody or control of the insured or property as to which the insured for any purpose is exercising physical control, or (4) any goods, products or containers thereof manufactured, sold, handled, or distributed or premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises.

Endorsement 10 (Tr. 21, 22, Exhibit "A") which modified Exclusion (f)(1) is not applicable for the reason that appellee did not maintain in effect fire and extended coverage on the dock as required therein (Tr. 38, ¶ 31).

It is clear as the Court repeatedly held, Endorsement 3 and its substitute Endorsement 23 pertain only to Exclusion (b) and not to Exclusion (f), and neither En-

dorsement 3 nor 23 was designed to eliminate or otherwise affect the exclusion (Tr. 53, St. 54, Tr. 58, Conclusion of Law No. 3, Tr. 72). That conclusion is supported by the testimony of appellee's only witness concerning it, Mr. Walls (St. 108, 109, 118, 126).

Exclusion (b), Endorsement 3 and substitute Endorsement 23 all pertain to various watercraft *activities* of appellee at different places. They do not purport to refer to specific *property* not covered, nor do they refer to Exclusion (f).

Under these circumstances the applicable rule of law is stated in Appleman, Insurance Law and Practice, Vol. 13, §§ 7522 and 7537, in part as follows:

Section 7522:

> "In construing an insurance policy or certificate, all parts, both printed and written, should be given effect if possible . . . Wherever possible, the courts will harmonize such clauses if they can be reconciled by any reasonable construction since it cannot be assumed that the parties intended to insert inconsistent provisions . . ." (Cf. 44 CJS Insurance, § 300, p. 1206; 29 Am. Jur. Insurance, § 255.)

Section 7537:

> "In construing an endorsement to an insurance policy, the endorsement and policy must be read together and the policy remain in full force and effect except as altered by words of the endorsement. *Where the endorsement expressly provides that it is subject to all terms, limitations and conditions of the policy, it does not abrogate or nullify any provision of the policy unless it is so stated in the endorsement.*" (Emphasis supplied)

Here, every endorsement provides "[a]ll other provisions and conditions remain unchanged." It must be remembered that it was appellee—not the appellant-insurer—who demanded the language of Endorsement 23 as it appeared in its previous policy (Exhibit "I"; transmitted per Item 8, Exhibit "I," and Item 8, Exhibit "J"; St. 81, 99). Accordingly, if such endorsement created any ambiguity in the policy, it should be interpreted against appellee (29 Am. Jur. Insurance § 259). But neither the appellee nor the appellant were confused into believing that Exclusion (f) was inoperative or modified by Endorsement 23. Mr. Walls, appellee's expert, so testified (St. 116, 117).

Since Endorsement 23 and Exclusion (f) may be construed in harmony, with equal dignity, the only question to be resolved is whether or not the damaged property (dock) was that of the kind excluded under Exclusion (f). The explosion and fire which destroyed the dock occurred while the dock was being occupied and used by appellee for the specific purpose for which it was designed, constructed and maintained. If any effect whatsoever is to be given to Exclusion (f) it is clear that appellee cannot prevail.

Appellant submits that the "oil dock" involved was excluded from liability coverage for at least the reasons stated in Exclusions (f) (1) and (2) and, perhaps, also for the reasons stated in Exclusion (f) (3).

The basic rule involved is stated in 29 Am. Jur. Insurance, § 252, as follows:

> "*Meaning of Words and Phrases*—Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary, and popular sense, unless such terms have acquired a different and technical sense in commercial usage or unless it clearly appears from the context that it was the intention of the parties to use such terms in a technical or peculiar sense . . ."

Town of Tieton v. General Ins. Co. of America, 61 Wn.2d 716, 721, 380 P.2d 127 (1963), and cases cited therein; *Anderson v. Lumbermen's Co.*, 53 Wn.2d 404, 407, 333 P.2d 938 (1959); *Lesamiz v. Lawyer's Title Ins. Co.*, 51 Wn.2d 835, 838, 322 P.2d 351 (1958); *Lawrence v. Northwest Cas. Co.*, 50 Wn.2d 282, 285, 311 P.2d 670 (1957).

It is submitted that the words "occupied," "rented" and "used" should be taken in their plain, popular, ordinary and customary meaning and that such words have not acquired any technical, special or different meaning in commercial usage. Appellee has not suggested otherwise.

1. Property . . . *occupied* by appellee:

How can appellee seriously assert that it was not occupying the dock for the purpose for which constructed?

2. Property . . . *rented* to appellee:

The use of the dock was included as a subject of several leases (Exhibit "C," Stipulation Tr. 83). There is

no evidence that anyone else leased, rented or occupied the dock, and the mere fact that others might sometime likewise be permitted to use the dock does not negate appellee's rental thereof.

3. Property . . . *used* by appellee:

The word "used" in a farm liability policy excluding property "used" by the insured implies customary practice, continuity, or a certain duration of time. *Connecticut Fire Insurance Company v. Reliance Insurance Company of Madison,* Wash. D. C. Kan. 208 F. Supp. 20, 25; Cf. *Murphy v. Trazmor,* 110 Colo. 446, 135 P.2d 230, 232, 145 ALR 1059.

As stated by the Washington Supreme Court in *Smith v. Northern Pacific Ry. Co.,* 7 Wn.2d 652, 110 P.2d 851, 854:

> "The verb 'use' or 'used' means to employ or be employed or occupied, in which sense it includes a single isolated instance of use, and also to practice customarily or, in the case of a place or thing, to be the subject of customary practice, employment or occupation."

How can appellee seriously contend that it was not the customary user of the dock when its barges tied up there 225 times (Barge 535, 30 times) during 1958 to transfer petroleum and the dock was destroyed while being used by appellee for the purpose for which it was constructed.

4. Property . . . in the care, custody or control of the insured.

At the time of the loss appellee had both proprietory and possessory control of the dock. *International Derrick and Equipment Co. v. Buxbaum*, CA 3, 240 F.2d 536, 62 A.L.R. 1237 (1957); also S. *Birch & Sons Const. Co. v. United Pacific Insurance Co.*, 52 Wn.2d 350, 324 P.2d 1073.

If the dock was not in appellee's care, custody and control, and property as to which it was exercising physical control, it is hard to imagine who was in and exercising such control.

Appellee has affirmatively shown that the property damaged (oil dock) fits squarely within one or more of the various provisions of Exclusion (f) (Tr. 37, 38). It cannot now say that it was not using the dock simply because others might have used it at some other time. The adjective "non-exclusive" modifying "use" is nowhere to be found in Exclusion (f) and the court erred in finding and concluding that, because appellee's use was non-exclusive (at other times), Exclusion (f) did not apply. Appellee was involved in this loss only because it was using and occupying the dock leased by it from the port, exercising care, custody and control and actual physical control, in accordance with its business practices of long standing.

If, as Mr. Walls states, Endorsement 23 and Exclusion (f) were separate and distinct, and the one did not affect the other, the Court erred in receiving parol evidence as an aid in interpreting the contract, because there was nothing to interpret and the policy should be applied

to the facts according to its terms. 29 Am. Jur. Insurance, § 246; 44 CJS Insurance, § 297 b; *Collins v. Northwest Casualty Co.,* 180 Wash. 347, 355, 39 P.2d 986, 97 A.L.R. 1235.

2. Parol evidence should not have been admitted

Because the contract was clear and unambiguous, the Court erred in receiving parol evidence concerning the negotiations which preceded and surrounded its execution and the issuance of subsequent endorsements; it is to prevent this very thing that Washington had adopted RCW 48.18.190 which provides:

> "Policy must contain entire contract. No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy."

In *National Indemnity Co. v. Smith Gandy, Inc.,* 50 Wn.2d 124, 309 P.2d 742 (1957), it was held that a letter confirming coverage was inadmissible. *Western Casualty & Surety Co. v. Harris Petroleum Co.,* U.S.D.C. S.D., California, Central Div. (1963), 220 F. Supp. 952, applied such principle to correspondence and previous policies.

Likewise, the policy (Tr. 14; Ex. "A") provides:

> "16. *Changes.* Notice to any agent or knowledge possessed by an agent or any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement

issued to form a part of this policy, signed by an executive officer of the company."

"19. *Declarations.* By acceptance of this policy the named insured agrees . . . that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."

Miller v. Penn Mutual Life Insurance Co., 189 Wash. 269, 64 P.2d 1050 (approved in *Kane v. Order of United Commercial Travelers*, 3 Wn.2d 335, 100 P.2d 1036 (1940)), stated:

"It is well settled that all parts of an insurance policy must, if possible, be harmonized and given effect (citation).

"The liability of respondent [insurer] is fixed by the terms of the contract, and its terms, if plain and free from ambiguity, must control (citation).

"In thus construing the policy we are not unmindful of the rule that policies are construed in favor of the insured and most strongly against the insurer, as held in *Starr v. Aetna Life Insurance Co., supra*, but this rule should not be permitted to have the effect to make a plain agreement ambiguous and then interpret it in favor of an insured (citation)."

It is submitted that in the instant case, the appellee, rather than relying on the plain language of the policy as understood by Mr. Walls—that Endorsement 23 did not affect Exclusion (f)—sought to create an ambiguity by its own suggested endorsement in order to obtain favorable interpretation.

Under the statute and cases cited it is clear that Exhibits "I" and "J" should not have been admitted in evidence and that none of Mr. Walls' testimony concern-

ing conversations leading up to the policy and endorsements should have been admitted. Under the circumstances and particularly the failure of substantial evidence to support the findings of fact, appellant should be entitled to reversal and dismissal.

3. The parol evidence, assuming it admissible in evidence, received over appellant's objection, does not support the judgment.

The most that may be said for appellee's parol evidence is that it shows that:

1. Appellee wanted its insurance package placed through three different brokers (St. 73).

2. Because of lower premium appellee placed coverage with appellant through Robert O. Fleming, broker (St. 75).

3. Appellee wanted an endorsement on its policy with appellant the same as it had with Glenns Falls Insurance Company, its prior insurer (Exhibit "I," Exclusion (1) Endorsement 23, Exhibit "A," Tr. 23, St. 76).

4. Appellant complied and issued Endorsement 23 after receiving appellee's letter to Fleming (Exhibit "I" and accompanying endorsement and Exhibit "J," Item 8).

5. Endorsement 23 did not affect Exclusion (f) (St. 109, 126).

6. Appellee's earlier Glenn's Falls policy had maximum limits of $15,000.00 (Exhibit "L").

7. Endorsement 10 of Exhibit "A" (Tr. 21) provided

such coverage on a conditional basis, but appellee did not comply (Tr. 38, ¶ 31).

8. Appellant's limits of potential liability were $500,000.00 each accident (Tr. 15, St. 103).

9. Glenn's Falls modified its care, custody and control exclusions by deleting Exclusion (j) and (k) thereof (Ex. L, St. 99, 101, 102), although appellant would not do so without additional premium (St. 117) and, to Mr. Walls' knowledge, Exclusion (f) never was deleted (St. 117).

CONCLUSION

Appellant submits that the facts admitted by appellee in the pre-trial order clearly establish the dock as property excluded under Exclusion (f) of Exhibit "A." The parol evidence erroneously received only tended to support appellant's position that, in view of the potential hazard—one-half million dollars and gasoline unloading operations—it would not modify Exclusion (f) without additional premium. Accordingly, if the dock was, at the time of loss, property as described in Exclusion (f), the Judgment must be reversed.

Appellee has never seriously suggested that it was not "occupying" and "using" the dock at the time of the loss. Rather, it has only suggested that others also might have used the dock at other times—and the Court so found in the term "non-exclusive." But this adjective is not in the policy, and it ought not now be interlined by the judiciary under the guise of interpretation.

The judgment should be reversed with instructions to dismiss or at least a new trial granted with instructions to consider only the facts surrounding the loss with reference to Exhibit "A."

Respectfully submitted,

WALSH & MARGOLIS
By ROBERT J. HALL
Attorneys for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with these rules.

ROBERT J. HALL
Attorney for Appellant

APPENDIX

Table of Exhibits

Exhibit No.	*Description*	*Identified*	*Offered and Received*
A	Insurance Policy	Tr. 50	St. 8
B	Diagram of the dock	Tr. 50	St. 8
C	Lease dated Nov. 1, 1941	Tr. 50	St. 8
D	Lease dated July 6, 1945	Tr. 50	St. 8
E	Lease dated March 5, 1952	Tr. 50	St. 8
F	Lease dated March 1, 1953	Tr. 50	St. 8
G	Diagram of oil dock	Tr. 51	St. 8
H	Group of five photographs	Tr. 51	St. 8
I	Letter dated July 14, 1958, from Robert O. Fleming & Co., Inc.	St. 9	St. 10
J	Memorandum to File From from Sam Soter	Tr. 51	St. 8
K	Letter dated February 26, 1965, from Port of Pasco	Tr. 51	St. 8
L	Glen's Falls Insurance Policy	Tr. 96	St. 96